No. 12375.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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TOPICAL INDEX

PAGE

Statement of jurisdiction 1

Statement of the case 2

Questions in the appeal 3

The facts 4

Detail of evidence by counts 6

Count One 6

Count Three 7

The indictment substituted for Count Two 9

Evidence applicable to all counts 11

Argument 12

I.

The indictments are adequate 12

II.

The crimes charged were proved 15

III.

The court properly admitted the evidence of which appellant complains 19

IV.

Appellant was not entitled to his Proposed Instructions 27 and 30 20

Conclusion 21

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Borchort, In re, 47 Fed. Supp. 387	15
De Pratu v. United States, 171 F. 2d 75	12
Fleet v. United States, 228 Fed. 421	15
Russell Motor Car Co. v. United States, 261 U. S. 514	15
United States v. Achtner, 144 F. 2d 49	13, 16, 17

Statutes

United States Code, Title 8, Sec. 452	5
United States Code, Title 8, Sec. 746(a)(18)	1, 2, 15
United States Code, Title 28, Sec. 41(2)	2
United States Code, Title 28, Sec. 225(a)	2

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BRIEF OF APPELLEE.

Statement of Jurisdiction.

This is an appeal from two judgments rendered against Appellant in the United States District Court for the Southern District of California, Central Division, upon two verdicts finding Appellant guilty in consolidated cases of three violations of U. S. C. Title 8, Sec. 746(a)(18) —falsely claiming to be a citizen of the United States.

The earlier of the two indictments (No. 20069) in Count One charged a violation of said statute on or about June 21, 1947. In Count Three a violation was charged as of May 25, 1944. Count Two of that indictment was dismissed and the offense therein alleged was charged in a new indictment (No. 20604) alleging a violation of said statute on or about November 1, 1945 [Indictments R. 2, 11; Verdict R. 34; Judgments R 38, 40]. Appellant was sentenced to the custody of the Attorney General for imprisonment and was fined upon each Count.

The District Court had jurisdiction under 28 U. S. C., Sec. 41(2).

This Court has jurisdiction of the appeal under 28 U. S. C., Sec. 225(a).

Statement of the Case.

Count One of the indictment No. 20069 charged Appellant with having violated sub-paragraph (18) of Section 746(a) of Title 8, U. S. C.

The language of the body of the indictment is as follows:

> On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.

Count Three of said indictment charged an offense in the same language with the exception that the date thereof was charged as May 25, 1944 and the person to whom the Appellant represented himself was J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California [R. 3].

Before the trial Count Two of said indictment was dismissed and Indictment No. 20604 was filed in its stead.

In language it was the same as the above quoted first Count except that the date of the offense charged was November 1, 1945, and the false representation was charged to have been made to the Los Angeles Police Department, a department and agency of the City of Los Angeles, State of California [R. 11].

Appellant's Motions to dismiss the indictments were denied [R. 4, 10, 12, 48, 51]. It was stipulated that the two indictments be tried together [R. 52]. They were so tried [R. 47-250]. Appellant was convicted upon all counts [R. 247-249].

Questions in the Appeal.

Appellant's brief on appeal states several bases of attack on the judgments. They all resolve into certain basic challenges as follows:

A. That the Indictments are deficient;

B. That the evidence was insufficient to establish the offenses;

C. That the Court erred in the admission of certain evidence.

D. That the Court erred in refusing to give Appellant's requested Instructions 27 and 30.

Appellee will treat of these propositions under the following titles:

I. The Indictments Are Adequate.

II. The Crimes Charged Were Proved.

III. The Court Properly Admitted the Evidence of Which Appellant Complains;

IV. Appellant Was Not Entitled to His Proposed Instructions 27 and 30.

The Facts.

Certain facts are of common application to all counts of the indictment of which Appellant has been convicted. They establish that Appellant was not a citizen of the United States at the times charged in the several counts; and that he knew that he was not a citizen of the United States at the times he made statements that he was such a citizen. Said facts, fundamental to each count, were established at the trial as follows:

Appellant's landlady, Lillian May Hoover, identified Appellant [R. 72] as a tenant of an apartment in her apartment house in Los Angeles. He occupied it under a lease [Ex. 8, R. 73], and has resided there since June 6, 1944 [R. 75]. Ray E. Griffin, Chief of the Nationality and Status Section, Immigration and Naturalization Service [R. 76-77], testified that all of Southern California, including Appellant's apartment is within the district served by his office. That office has a record of persons who have achieved citizenship in Southern California, by naturalization. Those records do not show Aaron Smehoff (the name under which Appellant was indicted) or Allen Smiley (the name used by Appellant) as having been naturalized [R. 78-79]. Exhibit 3 is a "Certificate of Non-Existence of Naturalization Record" (admitted in evidence) [R. 79]. It shows that there is no record in the central office of the Immigration and Naturalization Service of naturalization of any person named Aaron Smehoff or Allen Smiley.

Another official of the same Service, Perley B. Dunn, testified that he took the fingerprints of Appellant as they appear on Exhibits 1 and 2 [R. 146-147]. It was stipulated Appellant signed Exhibit 1 [R. 147] and that he

also signed the document of which Exhibit 2 is a photostat [R. 147]. It was further stipulated that as to the portions of the exhibit not covered by the Clerk, the questions appearing thereon were asked of Appellant by Mr. Dunn, an official of the Immigration and Naturalization Service and that the answers recorded were given Mr. Dunn by Appellant who was under oath [R. 149]. Exhibit 2 shows in substance that Appellant, in his declaration under oath, states that he is a foreign born alien, and on October 1, 1945 registered as such under the wartime statutes which required such registry by aliens in the United States.[1] Appellant was under oath at the time. The Exhibit bears various date stamps. It was stipulated Appellant signed it October 1, 1945 [R. 152]. Appellant was at that time in the office of the Immigration Service in connection with a deportation proceeding instituted by the United States Government [R. 153-155]. Appellant's attorney was present. On October 1, 1945, Appellant testified before a hearing officer of the Immigration Service that he had been born in Russia and taken to Canada as a child; that

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[1]8 U. S. C. 452:

"Registration of aliens in United States

"(a) It shall be the duty of every alien now of hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

"(b) It shall be the duty of every parent or legal guardian of any alien now or hereafter in the United States, who (1) is less than fourteen years of age, (2) has not been registered under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for the registration of such alien before the expiration of such thirty days. Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted."

he believed he was a naturalized citizen of Canada because of the naturalization of his father to Canadian citizenship before Appellant reached the age of 15 years [R. 156].

Following the reception of said evidence, Appellant's counsel stipulated that Appellant had been born abroad in what was then a part of Russia, and as a baby disembarked with his parents in the Dominion of Canada and has been an alien resident of the United States during all times mentioned in the Indictment.

Detail of Evidence by Counts.

Count One.

During 1947, Thomas A. Cox was employed by the Beverly Hills Police Department as a Desk Clerk. He was one of the men who kept identification records together and also worked at booking persons in custody [R. 114]. The procedure employed at the police station required that a person arrested and brought in for booking be brought to the booking counter where the desk clerk would take a regular prescribed form [Ex. 7] and ask the person arrested the questions indicated on that form and would fill in on the form the answers given by the person arrested [R. 115].

On June 21, 1947, Mr. Cox was on duty as desk clerk at the booking office. Appellant was then in custody of the Beverly Hills Police Department. There had been a murder, and he was a person that was near, and was questioned along with other people. Although under arrest at the time, and the hereinafter specified questions were put to him, he was never charged with the crime then under investigation. When brought to Mr. Cox at

the booking desk, Cox asked him questions detailed at R. 117-118 to which Appellant answered, making the following representations:

That his name was Allen Smiley. He resided at 1220 Sunset Plaza Dr., Los Angeles, California. His telephone number was CR 19145; his eyes blue and his hair grey. His height five feet eleven inches and his weight 170. Age 39. Complexion Ruddy. Build Medium. He said his descent was Jewish, and his Nationality American; that he was born in New York January 10, 1908, had been in Los Angeles County twenty years; California the same length of time; and that he had been in the United States all of his life [R. 117-118].

Count Three.

During the seven years preceding the trial, Jacob E. Siu was a deputy sheriff of Los Angeles County [R. 80]. On May 25, 1944, he arrested Appellant, took him to the sheriff's office, and booked him [R. 81]. By "booking" the witness meant getting information down on paper before jailing the prisoner [R. 82].

In connection with booking Appellant, Deputy Sheriff Siu prepared Exhibit 4. He obtained the information, which appears on that Exhibit, by asking Appellant questions and writing down the answers given. The purpose in taking the information is to preserve an identification record. In preparing Exhibit 4 [admitted R. 91], the deputy sheriff asked Appellant questions in reply to which

Appellant said that he had lived in Los Angeles County eighteen years, and in the United States all of his life. He gave his age as 37 years [R. 80-83].

As part of the same booking procedure Deputy Sheriff Siu took Appellant to the Senior Clerk in the department which booked prisoners. The booking routine was continued in Mr. Siu's presence by the Clerk, Witness Milton S. Hopkins typing certain information on Exhibit 5 [received in evidence R. 136]. Among other things, he asked Appellant whether he was a citizen of the United States. Appellant replied, "Yes" [R. 123], and gave his birth place as "New York" [R. 122]. The witness typed the answers on Exhibit 5.

In the course of a long cross-examination [R. 125-136], Witness Milton S. Hopkins was asked if he had an independent recollection that Appellant gave the particular answers recorded on Exhibit 5. The witness replied: "I do remember that I asked those questions and I put down the answers that was given me" [R. 128]. When his memory was challenged because of the lapse of time between event and testimony, he stated he remembered because Bugsey Siegel was being booked at the same time and the case had attracted photographers so that it became an event he remembered independently [R. 126-128]. Exhibit 5 is a record kept and required to be kept by the Sheriff's office in the regular course of business and is acted upon in business concerning the prisoner [R. 133-136].

THE NEW INDICTMENT SUBSTITUTED FOR COUNT TWO.

On November 1, 1945, Orville E. Harper was a Los Angeles City Police Officer [R. 99]. He was a booking officer at the Lincoln Heights Jail in Los Angeles [R. 100]. On said date at about 3:00 A. M., the witness Harper booked Appellant at that jail. At that time said Harper placed the information relative to Appellant on Exhibit 9 [received in evidence at R. 113]. He received the information from Appellant at the time he was booked [R. 101]. It is the practice to ask prisoners to sign the document after it is prepared [R. 102].

Some of the information on Exhibit 9 was copied from a booking slip and part of it was typed on Exhibit 9 directly following the giving of an answer to the question by Appellant [R. 107]. The answer "Yes" after the query, "citizen" was placed on Exhibit 9 by the witness following his having asked the question of Appellant, and Appellant having answered "Yes" [R. 107]. Appellant also replied orally to the witness's queries, that he was 38 years of age, had been in Los Angeles County for 20 years and had been in the U. S. A. for 38 years [R. 107-108]. The only information on Exhibit 9, which was copied rather than written in reliance upon direct answers of Appellant, is the address of Appellant and the location of the arrest [R. 108-109].

Exhibit 9 was prepared by the witness pursuant to a departmental order.

It was then stipulated that Don Myer, a qualified handwriting expert, should be deemed to have testified that a comparison of the signature of Appellant upon Exhibits 1 and 2 (which had been signed by Appellant in the presence of Witness Hamilton) with the signature upon Exhibit 9 disclosed that the name "Allen Smiley" on Exhibit 9 had been written by the same person who had signed that name on Exhibit 9 [Exhibits 1, 2 and 9 were admitted at R. 113-152]. The only objection to the receipt of Exhibit 9 in evidence was that it was irrelevant and immaterial.

Frank H. Cunningham testified that he is the Assistant Commander of the Record and Identification Division of the Los Angeles Police Department [R. 96]. Records are kept under his directions. Exhibit 9 is known as an identification report. It is the Los Angeles Police Department's Form 5.5 and is required to be kept in the usual and ordinary course of the business of the Police Department. It is acted upon by the police department in its work and is available to all *bona fide* law enforcement agencies, including the Immigration and Naturalization Service of the United States.

The Form 5.5, Exhibit 9, is used by the Police Department as an adjunct to the finger print card. It furnishes additional information for future identity of the subject. The information is indexed in various forms [R. 97].

If it comes to the attention of Mr. Cunningham's department that an arrested man is an alien, the Immigration

Department is notified. Specifically, Mr. Pendergast, Mr. Cole, or Mr. Nelson are contacted [R. 143-144]. Fingerprints, arrests, and the nature of the offense are automatically sent to the Federal Bureau of Investigation [R. 144-145]. In booking routine, the police are interested in a lot of statistical information for purely police purposes [R. 145]. The practice of referral to the Immigration Service was enforced during 1944, 1945, 1946 and 1947 [R. 146].

Evidence Applicable to All Counts.

Richard B. Hood testified that he is the Special Agent in Charge of the Federal Bureau of Investigation at Los Angeles [R. 137]. He is familiar with the use made by that Bureau of identification material and information taken from prisoners in police stations, sheriffs' offices and the like. Identification orders are prepared from identification cards submitted to the Bureau. Nationality and citizenship information is a pertinent part of the identification record, the same as age, height and weight. Information as to nationality and citizenship is of tremendous value to an investigating officer. Identification material concerning persons suspected of crime, arrestees and persons prosecuted is kept by the Bureau in its Identification Division in Washington, D. C. Such files are available to the Immigration and Naturalization Service and the Service is notified when an alien receives a sentence in court [R. 137-143].

ARGUMENT.

I.

The Indictments Are Adequate.

The form of the indictment is the classical one which has been used for many years. It has been expressly approved by this Court in *De Pratu v. United States,* 171 F. 2d 75 (C. C. A. 9, December 13, 1948). In its essential charging language, the indictment in that case is like that in the cases now before this Court. In upholding the sufficiency of the indictment, the Court, in the *De Pratu* case, said:

> "The attack upon the sufficiency of the indictment is based upon asserted necessity for allegation and proof of fraudulent purpose in the making of the false claim of citizenship. The present statute does not expressly so provide, and from a reading of it it readily appears, contrary to appellant's contention, that Section 746(a) (18), Title 8, U. S. Code (now 18 U. S. C. A., §911), under which this indictment was laid, *does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship, although that fraudulent purpose was a necessary ingredient of the similar offense under the previous law which was supreseded by said Section 746 (a) (18).* We find no error in the trial court's refusal to dismiss any count of the indictment for failure to allege fraudulent purpose or for any other reason." (Emphasis supplied.)

In its Decision, this Court of Appeals cited and followed the Court of Appeals for the Second Circuit in its Decision in *United States v. Achtner,* 144 F. 2d 49. The indictment is described and discussed in the opinion in the *Achtner* case as follows:

> "The indictment here charged that on or about October 8, 1941, defendant, Wolfgang T. Achtner, being an alien never naturalized as a citizen, 'unlawfully, wilfully and knowingly did falsely represent himself to E. D. Kenney of the Ebasco Services, Inc., 2 Rector Street, New York City,' to be a naturalized citizen of the United States, in violation of 8 U. S. C. A., §746(a) (18), which was expressly cited. Defendant pleaded 'not guilty' to this charge at his arraignment on January 11, 1944; but on January 21, 1944, the day on which his present counsel was assigned, he changed that plea to 'guilty.' Thereafter, on February 2, 1944, he moved for an order permitting him to change his plea to 'not guilty' and to quash the indictment as insufficient on its face. The court denied the motion, however, in a considered opinion and sentenced defendant to imprisonment for three years. This appeal attacks the judgment of conviction and the denial of the motion to quash the indictment and change the plea of 'guilty' on the ground that no offense against the United States had been charged.
>
> "The statute, 8 U. S. C. A., §746(a), sets out in thirty-four numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and the control of aliens in this country. It represents for the most part a codification in one place in the National-

ity Act of 1940 of offenses formerly scattered in various places. Subdivision (18), with which we are immediately concerned, makes it a felony for any alien 'knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.' This subdivision is a substantial reenactment of the repealed 18 U. S. C. A., §141, originally passed in 1870, which, under the heading, 'Falsely claiming citizenship,' made liable to fine and imprisonment any person who 'for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.' Thus, the only pertinent difference between the definitions of the two sections is that the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' Significant also is the increase in the penalty by the later legislation from a maximum of $1,000 fine and two years' imprisonment to a $5,000 fine and five years' imprisonment.

"(1-3) The first and most important question with which we are presented concerns the sufficiency of the indictment, which, as we have seen, does little more than reiterate the language of the statute. We are no longer bound by ancient and antiquated rules of common-law criminal pleading, and can now consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations. * * *."

II.

The Crimes Charged Were Proved.

The evidence must be tested by the statute which defines the offense, rather than by counsel's unenacted and legally non-existent restrictions. The statute is concise and clear. The salient provisions of Section 746, Title 8, are as follows:

> "(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> "* * *
>
> "(18) *Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.*" (Emphasis supplied.)

Where the language of a statute is unambigous, recourse to outside sources in its interpretation is not permissible. The language of the statute in this case is plain and there is no occasion for construction. It construes itself.

> *Russell Motor Car Co. v. United States,* 261 U. S. 514.

The intention of Congress in enacting a statute is to be sought for primarily in the language used, and, if the language is clear and unambiguous, it must be accepted without modification, and without resort to construction or conjecture.

> *In re Borchort,* 47 Fed. Supp. 387;
>
> *Fleet v. United States,* 228 Fed. 421.

There is no conflict in the evidence. The contention that it is insufficient boils down to a theory that the persons to whom the false representations were made in the first indictment, and the Police Department in the second, were not persons "having good reason to inquire into the nationality status of the defendant." In view of the emphasis placed on this argument, it is an odd circumstance that the overruled objections to materiality and relevancy of evidence were all directed at testimony which enhanced the picture of law enforcement officers having a serious use for the information Appellant was asked to provide them relative to his citizenship status.

Appellant attempts to squeeze more out of the *Achtner* case than was ever poured into it by the learned Judges of the Second Circuit. At page 26 of his brief, he attempts to place "fraudulent purpose" back into the statute by judicial construction.

The "law" of the *Achtner* case does not modify the existing statute. It only comments that words spoken as a mere boast or jest or to stop the prying of some busybody are not criminal under a statute which obviously covers serious as distinguished from frivolous transactions.

The prohibition of the statute is absolute. The language adopted by Congress does not hedge the restriction upon the conduct of aliens to a few limited situations. Instead, Congress repealed the old law which did denounce false representations for a "fraudulent purpose." As was said in the opinion in the *Achtner* case (144 F. 2d 49, at p. 50), "* * * the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.'" Retention of the word "represent" requires that to ground

the offense, there be an element of seriousness to a statement that one is a citizen of the United States. But it does not reinstate the repealed "fraudulent purpose" as an element when the re-enactment clearly took "fraudulent purpose" out and left as the only qualifying phrase "knowingly to falsely represent." Although "falsely" is an ingredient of "fraudulently," the *repeal* of "fraudulently" leaves "falsely" to stand by itself, stripped of the additional ingredients which go to create fraud. The old and present statutes are compared and discussed in *United States v. Achtner,* 144 F. 2d 49.

In its comment, the Court said:

> "* * * And the intent of Congress in October, 1940, when §141 of Title 18 was replaced by §746 of Title 8, was quite obviously to extend, rather than to reduce, the coverage, as well as the penalties, of the prior law, for the latter statute was part of the Nationality Act of 1940, a national defense measure enacted in the face of the impending war to help tighten controls over the conduct of aliens in this country. * * * Subsections (b) and (c) must, therefore, clearly be read as intended additions and amplifications of the provisions of subsection (a), rather than as narrowing and well-nigh stultifying limitations of it."

The Indictment charges that the persons to whom Appellant falsely represented himself as a citizen of the United States had "good reason to inquire."

This is a pleader's way of saying that the false representation did not consist of words spoken as a mere boast or jest or to stop the prying of some busybody.

The proof supports the pleading.

The Agent in charge of the Los Angeles Office of the Federal Bureau of Investigation testified [R. 137-143] that the Bureau maintains identification records in Washington, D. C.; that this is a central place where identification data concerning persons suspected of crime, arrestees, and persons prosecuted is kept; that information from those files is provided law enforcement agencies and in turn *the Bureau accumulates identification material from police stations, sheriffs' offices and the like.*

The Assistant Commander of the Record and Indentification Division of the Los Angeles Police Department testified [R. 96-98 and 143-146] that his Department supplied identification information relative to arrestees to the Federal Bureau of Indentification and that if an arrested man stated he was not a citizen of the United States, the Immigration Service was notified of the arrest.

Appellant contends that the inquiry made of him was not material to the transaction at hand, and hence the answers given did not amount to false representation.

This contention disregards the fact that the matter at hand was not an inquiry into whether Appellant had committed an offense, but was the *acquisition of identifying characteristics* by police officers who worked in the climate of acquiring that information:

> A. So that they would have identification characteristics of a prisoner who was being booked and might make bail *and might become a fugitive, and for whom they might have to search and alert others to search.*

The local agent in charge of the Federal Bureau of Indentification testified that, knowledge of a fugitive's citizenship would be "of tremendous value to an investigating officer." [R. 138.]

B. So that they would be able to convey the identification information to the Central office of the Federal Bureau of Indentification.

C. So that they could notify the Immigration and Naturalization Service if the arrestee were an alien.

D. So that officers of the Immigration and Naturalization Service would be alerted to inquire further if the alien-arrestee were either a person under or subject to deportation proceedings; or an applicant for naturalization under a necessity of being of good moral character.

III.

The Court Properly Admitted the Evidence of Which Appellant Complains.

Appellant argues that the several officers who questioned him as to whether he was a citizen were "busybodys." When the law exempts from criminality mere boasts, jests, or words uttered to stop the prying of some busybody, it certainly admits evidence to disclose that real use is made of the information elicited and that the inquiry is in the course of regular business.

IV.

Appellant Was Not Entitled to His Proposed Instructions 27 and 30.

The Proposed Instruction 27 reads as follows:

"Instruction No. 27.

"Testimony has been received that the defendant on one occasion was interviewed by city police officers of Beverly Hills, California, during the course of an investigation into the commission of an offense against the State of California. Also testimony has been received concerning routine interrogation of the defendant by municipal and county police officers at the time of his arrest and routine booking for violation of local gambling laws. Statements made by the defendant on those occasions were not made in the course of any judicial proceedings or under oath. The questions asked concerning his citizenship were all immaterial to the particular investigation and charges, and the defendant was not under any legal requirements to answer such questions." [R. 30.]

The interrogation of Appellant was not an inquiry into an alleged violation of gambling laws. Every person to whom Appellant falsely represented himself to be a citizen of the United States was accumulating identification data at a booking of Appellant.

The Proposed Instruction 30 is also warped to the mistaken theory that Appellant was asked his citizenship status as a part of an investigation for gambling:

"Instruction No. 30.

"Inquiry by a city or county police officer in connection with the arrest of an individual for an alleged

violation of gambling laws as to the place of such individual's birth or citizenship does not impose upon such individual any legal obligation to answer such question truthfully." [R. 31.]

Most offenses having to do with untruths punish for unsworn statements. Assuming, but not conceding, that Appellant could properly have refused to answer the queries put to him, it still remains that such a right could be waived. If it existed in this case it was waived by being answered, as the questions were answered wilfully, and falsely, and deprived those acting upon the answers of true information. The answers properly became criminal under the very authorities relied upon by Appellant.

Conclusion.

It is respectfully submitted that the judgments should be affirmed.

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